

EXHIBIT C

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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

IN RE: TRICOR DIRECT PURCHASER : CIVIL ACTION
ANTITRUST LITIGATION :
NO. 05-340 (KAJ)

THIS DOCUMENT RELATES TO: : (Consolidated)
ALL ACTIONS :

-and-

IN RE: TRICOR INDIRECT PURCHASER :
ANTITRUST LITIGATION :
NO. 05-360 (KAJ)

THIS DOCUMENT RELATES TO: : (Consolidated)
ALL ACTIONS :

Wilmington, Delaware
Friday, March 3, 2006 at 11:32 o'clock, a.m.
TELEPHONE CONFERENCE

BEFORE: HONORABLE **KENT A. JORDAN**, U.S.D.C.J.

APPEARANCES: (Listed on page two)

Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES:

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P R O C E E D I N G S

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(REPORTER'S NOTE: The following telephone

14

conference was held in chambers, beginning at 11:32 a.m.)

15

THE COURT: Hi, this is Judge Jordan. Who do I

16

have on the line?

17

MS. ZELDIN: Good morning. This is Jessica

18

Zeldin from Rosenthal Monhait Rosen & Goddess on behalf of

19

certain plaintiffs. If it pleases the Court, I'll let my

20

co-counsel introduce themselves.

21

THE COURT: That's fine.

22

MR. CRAMER: Good morning, Your Honor. This is

23

Eric Cramer from Berger & Montague on behalf of the direct

24

purchaser class plaintiffs.

25

MR. DES ROCHES: Your Honor, this is Stuart

1 Des Roches also on behalf of the direct purchaser class
2 plaintiffs.

3 MS. MCGEEVER: Good morning. Excuse me. Go
4 ahead.

5 MS. NUSSBAUM: It's Linda Nussbaum also on
6 behalf of the direct purchaser plaintiffs.

7 MS. MCGEEVER: Your Honor, this is Elizabeth
8 McGeever, and I am here for certain individual direct
9 purchasers. And if it is permissible to the Court, my
10 co-counsel will introduce themselves.

11 THE COURT: Okay.

12 MR. SHADOWEN: Good morning, Your Honor. Steve
13 Shadowen on behalf of CVS and Rite Aid.

14 MR. PERWIN: Good morning. Scott Perwin on
15 behalf of the Walgren plaintiffs.

16 THE COURT: All right.

17 MS. INGERSOLL: Josy Ingersoll, Your Honor, on
18 behalf of Teva. And with me on the line is Chris Holding at
19 Goodwin Procter.

20 MS. MATTERER: This is Mary Matterer for Impax;
21 and on the line with me is Paula Blizzard from Keker Van
22 Nest for Impax.

23 THE COURT: All right.

24 MR. COTTRELL: Your Honor, Fred Cottrell for
25 Fournier; and on the phone with me is Steve Sunshine at

1 Cadwalader and Tim Bickham at Steptoe.

2 THE COURT: All right.

3 MS. GRAHAM: This is Mary Graham for Abbott; and
4 with me are Bill Cavanaugh and Chad Peterman from Patterson
5 Belknap.

6 MR. PARSHALL: Good morning, Your Honor.
7 Jonathan Parshall for Pacificare Health Systems. Also on
8 the line for Pacificare is John Turner.

9 MR. PARSHALL: Good morning, Your Honor. Zach
10 Naylor for indirect purchaser plaintiffs. I'm joined by
11 David Nalven of Hagens Berman.

12 THE COURT: All right.

13 MR. NALVEN: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. GAGALA: Good morning, Your Honor. It's
16 Bruce Gagala. I don't think Josy knew I was on the phone.

17 MS. INGERSOLL: I didn't. Sorry

18 MR. GAGALA: : No problem.

19 THE COURT: All right. Thank you.

20 MR. TAUS: Also Barry Taus for the direct
21 purchaser class.

22 THE COURT: Okay.

23 MR. GODDESS: Also Jeff Goddess. I wasn't able
24 to get through on my own call a few seconds ago. Thank you,
25 Your Honor.

1 THE COURT: Is there anybody else? Okay. A
2 cast of housands.

3 I appreciate everybody being on the call; and
4 when I look at the letters, it indicates to me be have two
5 discovery issues teed up for today. One is if I've got it
6 right, the plaintiffs' request for discovery into Hytrin
7 and Tranxene, if I'm saying those drug names correctly.
8 Specifically, switching from tablet form to capsule form as
9 evidence I take it from the submissions that the defendants
10 here really were making the switch in this case from TriCor
11 capsule to tablet for a nefarious purpose, an antitrust
12 purpose. And the second issue being tied up is the defend-
13 ants' request for downstream discovery, that is, sales
14 of the direct purchasers on down to other folks who were
15 interested in buying TriCor.

16 So am I right that that is the agenda we've got
17 today? There is no other thing out there, is there?

18 (Unidentified female voice): That's correct.

19 THE COURT: Okay. Well, why don't we start
20 with the plaintiff's request on this. And who is speaking
21 on behalf of the plaintiffs? I've got letters from a
22 couple different folks, but it appears that the arguments
23 are basically the same. Is there somebody that the
24 plaintiffs have selected to take the point?

25 MR. DES ROCHES: Good morning, Your Honor. This

1 is Stuart Des Roches of Odom & Des Roches in New Orleans,
2 and I believe I'm going to make the initial arguments on
3 behalf of the plaintiffs in that regard.

4 THE COURT: All right. Mr. Des Roches, please
5 go ahead.

6 MR. DES ROCHES: Yes.

7 THE COURT: And be assured I've read your
8 papers.

9 MR. DES ROCHES: Okay. As Your Honor has
10 pointed out, we do seek documents regarding Abbott's
11 conversion from formulations in Hytrin and Tranxene. And
12 as Your Honor has noted, one of the reasons we would like to
13 have those documents is to show Abbott's intent as well as
14 their purpose and effect in executing the TriCor conversion
15 from capsules to tablets.

16 As we pointed out to Your Honor in the letter,
17 there are documents which indicate those two conversions,
18 the Hytrin conversion and the TriCor conversion perhaps
19 being modeled off of one another or at least a recognition
20 they were very similar.

21 Now, we believe, Your Honor, that certainly a
22 conversion that is linked in the defendants' own documents
23 to at least some degree and a conversion in the instance
24 of Hytrin at least that went in the other direction from a
25 tablet to a capsule is certainly relevant to the intent

1 purpose and effect of the TriCor conversion.

2 As I understand the defendants' position, it is
3 that they argued that intent, for instance, or knowledge is
4 not an element of our monopolization case. Your Honor, I
5 would certainly agree with the defendants that intent or
6 knowledge is not is a formal element of our Section 2
7 monopolization case. However, I would disagree with them
8 that knowledge, purpose and effect and intent is not
9 relevant to our case.

10 Your Honor, since the defendants quoted and
11 cited Your Honor to the Grinnell Corporation case, which is
12 a 1966 United States Supreme Court case, however, there are
13 a couple of cases I'd like to point out to Your Honor that
14 have specifically dealt with this issue.

15 Some time after the issuance of the Grinnell
16 case, the United States Supreme Court issued the Aspen
17 Skiing Company case. The formal cite is Aspen Skiing
18 Company vs. Aspen Highlands, 472 U.S. 585. In that case,
19 the United States Supreme Court specifically held that while
20 intent is not a formal element to be shown in the Section 2
21 monopolization case, it did specifically state, and I quote
22 "that intent is relevant to the question whether the
23 challenged conduct is fairly characterized as exclusionary
24 or anticompetitive, to use the words in the trial court's
25 instruction, or predatory, to use a word that scholars seem

1 to favor."

2 More recently, Your Honor, the Third Circuit
3 itself has acknowledged that what would call relevance
4 reality. Although intent is not a formal element, it is
5 something that is certainly relevant to the inquiry as to
6 whether something is anticompetitive or not.

7 And I would cite Your Honor to the LePage's
8 case, which is a Third Circuit case, (2003), 324 F.3d 141,
9 which held the same thing as Aspen Ski and actually quoted
10 it. And there is even a more recent case from the Third
11 Circuit called Gordon vs. Lewiston Hospital, which is 423
12 F.3d 184, in which it said the exact same thing.

13 Professionors Arita and Hovenkamp have said the
14 same thing. And a quick quote from Arita and Hovenkamp is
15 in cases of ambiguity, knowledge of intent may help the
16 Court to interpret facts and to prevent consequences.

17 Your Honor, so I think from the intent or
18 knowledge point of view, it certainly seems to have been
19 recognized by many prominent cases, prominent scholars that
20 although it's not a formal element, it is most certainly
21 something that is relevant to the inquiry.

22 We have also sought these documents, Your
23 Honor -- aside from the knowledge and purpose and effect,
24 we've also sought these documents in regards to one of the
25 defenses that Abbott and Fournier appear to be putting forth

1 in this case. And that is that in this instance, the
2 TriCor conversion from a capsule to a tablet constituted an
3 innovation and they stand very prominently on that point in
4 their motions to dismiss.

5 As I understand the defendants' position, they
6 allege three types of innovation. One is in the conversion
7 from the capsule to the tablet and one is that the tablet
8 had a new indication. The new indication was for raising
9 good cholesterol. The other indication was for improved
10 bioavailability. And the third innovation was the fact that
11 the product moved from a capsule to a tablet.

12 And what we would like to show Your Honor and
13 what we would like to discover is whether, in other
14 instances, Hytrin and Tranxene, specifically Abbott took
15 the position that capsules were preferable to tablets as
16 opposed to the other way around, which is the position they
17 have taken in this case. For that reason, Your Honor, for
18 those general reasons, we believe that this discovery is
19 quite relevant to this case to the intent aspect of the case
20 as well as to the actual innovation arguments that the
21 defendants are putting forth.

22 THE COURT: Okay. I think I have your argument,
23 Mr. Des Roches. Thank you very much.

24 Who is speaking on this from the defendants'
25 perspective?

1 MR. CAVANAUGH: Your Honor, this is
2 Mr. Cavanaugh on behalf of Abbott.

3 THE COURT: Okay.

4 MR. CAVANAUGH: Your Honor, this is even more
5 remote than the discovery that they were seeking with
6 respect to TriCor future products which Your Honor rejected
7 finding that if there was a violation here, that would be
8 determined and discovered by looking at what was done with
9 respect to TriCor.

10 THE COURT: Well, let me press you on that a
11 little bit.

12 MR. CAVANAUGH: Go ahead.

13 THE COURT: When you say this is even more
14 remote, I want you to respond to the specific, two specific
15 points that have been made. And when you do, keep in mind
16 these quotes that they have put in front of me. A document
17 from Fournier that says "TriCor fit the Hytrin story:
18 Launch, expand, innovate with new dosage forms, managed
19 generics." That is quoted to me in the February 28th letter
20 from Mr. Shaw on behalf of Teva.

21 Later in that same letter, there is another
22 quote, minutes of a Fournier meeting apparently "to switch
23 capsule to tablets, NDA. Because it's a tablet, the dosage
24 form gets exclusivity."

25 You know, those are the kinds of things that I

1 believe Mr. Des Roches was referring to when he said they're
2 not making this stuff up, there is some evidence in what you
3 have already given them that you folks, Abbott and Fournier
4 had this in mind as a way to manage the generics entry into
5 the market.

6 Now you tell me how that would be remote. If I
7 accept that premise, is your argument still this is too
8 remote?

9 MR. CAVANAUGH: Well, it is, Your Honor.
10 Because only point those documents make is that Hytrin was
11 introduced at a lower dose and it was introduced as a
12 capsule. The real distinction here with respect to a
13 generic is TriCor came out with a lower dose and so did
14 Hytrin but that doesn't make Hytrin relevant here. Hytrin,
15 the decision was made to go from a tablet to a capsule
16 because of whatever the specifics were of that market.

17 The critical point is you are able to come out
18 with an improvement, a lower dose, which in the case of
19 TriCor, we did. When counsel for plaintiff was listing the
20 improvements, he neglected to note the most significant
21 improvement which is that it was a lower dose of
22 fenofibrate. And when you look at at the drugs against
23 which TriCor was competing, they were all tablets so it
24 made sense.

25 And what they will discover when they do

1 discovery of TriCor, which should be focus of this case,
2 is that the new formation, you could make it in a tablet.
3 Previously, under the older TriCor formulations and
4 manufacturing processes, they couldn't make it with a
5 capsule.

6 So my point, Your Honor, is that the focus we
7 believe should be on TriCor. If they want to make arguments
8 about intent, that can best be discerned by looking at
9 TriCor.

10 The Hytrin example they point to, that was 1995.
11 Tranxene is 1980. And, in fact, we learned last night they
12 got the facts wrong. That was I believe a move from a
13 capsule to a tablet, consistent with what was done with
14 TriCor. And I'm sure you can look through the history of
15 pharmaceutical companies and find lots of things that are
16 "consistent:" going from tablet to a capsule, lowering a
17 dose, getting additional improvements and indications, but
18 the fact that you are able to get a lower dose on one drug
19 and you got a lower dose on another drug doesn't inform you
20 as to whether there was some violation of the antitrust
21 laws with respect to the particular drug that is at issue
22 in this case.

23 The plaintiffs are saying essentially let's
24 try and compare improvements across different products,
25 products that compete in completely different therapeutic

1 categories that have nothing to do with one another. The
2 fact there is a document that says, you know, with TriCor
3 we're having, we're having a lower dose and there is a
4 movement from a capsule to a tablet like Hytrin, okay, I
5 don't see how that informs anyone as to intent or anything
6 that is relevant with respect to TriCor.

7 THE COURT: Okay.

8 MR. DES ROCHES: Your Honor, may I address those
9 two points real quick?

10 THE COURT: Yes, real quick.

11 MR. DES ROCHES: Your Honor, Mr. Cavanaugh
12 said that Hytrin went to a capsule due to the specifics of
13 that market. That is exactly what we want to know: the
14 specifics of that market that caused Hytrin to go from a
15 tablet to a capsule. Was it scientific matters or was it a
16 pure managed generic issue?

17 As to his point that Abbott takes the position
18 that it couldn't make the new version with a capsule, it's
19 something certainly subject to discovery in this case and
20 that is not a proposition we're necessarily willing to agree
21 to, with the documents we've seen so far on those point as
22 to why they did what they did with TriCor.

23 THE COURT: All right.

24 MR. CAVANAUGH: Your Honor, counsel
25 misunderstood me. I said under the old formulation of

1 fenofibrate, you could not make it as a tablet.

2 THE COURT: Okay. Well, here is the bottom line
3 on this one. I've got a ruling for you, and it's a partial
4 win for the plaintiffs.

5 I'm not prepared to say -- and I have to say
6 that the direct purchaser plaintiffs were kind enough to
7 give me the actual request they propound in this regard
8 which includes Request No. 78 and it's Exhibit A to the
9 February 27th letter from Mr. Goddess to me. And it's just
10 too broadly framed. They said they want the documents
11 relating to any decision with regard to FDA approval for
12 scale up, manufacture, market and/or promote a new dosage
13 form and/or formulation of a pharmaceutical product already
14 sold by you, including, but not limited to, Hytrin and
15 Tranxene, et cetera.

16 I understand that lawyers like to cast a net
17 broadly but I'm not getting into this "including, but not
18 limited to" kind of discovery. Nor am I prepared to throw
19 the net as broadly even as the Tranxene product because at
20 this point, all I have got is the assertion of counsel they
21 think there is something relevant going on there. In this
22 case, however, the information they've given me about Hytrin
23 is enough to indicate that it is relevant for the purposes
24 that the plaintiffs have outlined. That there was a switch
25 in product form, that part of the switch may have been to

1 "manage generics," and partly to get "exclusivity." And it
2 sheds light on, important light perhaps, I don't know, I
3 guess we'll wait and see what they come up with, but there
4 is enough of a basis in the record that they've developed
5 to persuade me that this isn't wholly irrelevant. On the
6 contrary, it's relevant to the two things that Mr. Des
7 Roches has outlined here and which were outlined in the
8 letters.

9 I'm going to allow that discovery. So you can
10 consider that done and we'll have a short order on that.
11 Now, how you explain that --

12 MR. CAVANAUGH: Your Honor?

13 THE COURT: Yes, Mr. Cavanaugh.

14 MR. CAVANAUGH: This is Mr. Cavanaugh. Is it
15 limited to that? They asked for all documents relating
16 essentially to Hytrin.

17 THE COURT: No, it's not all documents. I'm
18 just emphasizing this; all right?

19 MR. CAVANAUGH: Okay.

20 THE COURT: It goes to the two points that were
21 raised here, and you guys ought to be talking. I'm not
22 going to craft the discovery responses back and forth here.

23 MR. CAVANAUGH: I understand, Your Honor.

24 THE COURT: I'm telling you right now what they
25 do have is too broad.

1 MR. DES ROCHES: Your Honor, this is Stuart Des
2 Roches. We can talk with counsel for Abbott about this, but
3 I think we have some ideas in mind, specific ideas in mind
4 as to how to very specifically tailor and narrow those
5 requests to the items that go to the heart of what I spoke
6 about.

7 THE COURT: Well, that is what did you need to
8 do because I'm giving you the discovery about Hytrin as to
9 this specific, the two specific points that we've just
10 discussed. And those points are: What did they have in
11 their minds as they were making this switch? And what is
12 the evidence that this was motivated by something perhaps
13 beyond improvement or wholly other than improvement of the
14 product itself?

15 And you folks I hope can work with the guidance
16 I have given you to come up with something that is mutually
17 agreeable as a way to move forward.

18 All right. Mr. Cavanaugh, are you also taking
19 the helm with respect to the downstream discovery request?

20 MR. CAVANAUGH: No, Your Honor. Mr. Peterman
21 from my office will.

22 THE COURT: All right. Mr. Peterman, why don't
23 you go ahead and launch on that, please.

24 MR. PETERMAN: Thank you, Your Honor. As you
25 know from the letters, we are seeking the downstream

1 discovery relevant to sales of TriCor and other fenofibrate
2 products from the direct purchaser plaintiffs. We believe
3 this is relevant to two points. The main point is class
4 certification.

5 There is no preordained right under Rule 23 for
6 the direct purchasers to be certified as a class. In order
7 for them to be certified as a class, there must not be any
8 intraclass conflicts. The Hytrin court in the Eleventh
9 Circuit expressly realized the possibility of these
10 intraclass conflicts between the regional wholesalers for
11 these named plaintiffs and the Big Three wholesalers who we
12 have identified in our letter.

13 THE COURT: Yes. Can I ask you a question about
14 that?

15 MR. PETERMAN: Yes, Your Honor.

16 THE COURT: What, if any, weight should I give
17 to the letters that these these Big Three, as you have --
18 somebody called them the Big Three. I don't know whether
19 that is an industry standard way of referring to them or
20 not, but the letters they've sent me through counsel saying,
21 hey, we don't see any conflict here and we don't want Abbott
22 and Fournier purporting to speak for our interest. They
23 don't have in business doing that. What should I make of
24 those letters?

25 MR. PETERMAN: Your Honor, those letters, just

1 because those parties say that there is no conflict is not
2 dispositive of the issue. The Court, through Rule 23, needs
3 to decide, based on a full factual record, whether there
4 are indeed intraclass conflicts, because it protects the
5 interest of the defendants, it protects the interest of the
6 alleged class and it goes to the integrity of the federal
7 class action mechanism.

8 Those three very similar letters are striking in
9 part based on what is absent from those letters. In our
10 letters, we alleged that the Big Three operated on a cost
11 plus basis. Those letters did not address that. They do
12 not refute that. The letters from the regional wholesalers
13 did not address that or refute that as well. So before the
14 Court now, we've got a situation where Abbott and Fournier
15 alleged the possibility that there are different mechanisms
16 by which the regional wholesalers set their prices and the
17 Big Three and other unnamed wholesalers set their prices.
18 So the possibility of intraclass conflict still exists.

19 THE COURT: Well, help me out. Let's assume for
20 the sake of discussion that you were right, that they did
21 this on a markup basis. Does that change the legal right of
22 anybody to recover if they were to prove that in fact -- and
23 I'm not saying you did, obviously, but if they were to make
24 out their antitrust case, does that bar somebody from
25 recovering?

1 MR. PETERMAN: Your Honor, through this motion,
2 we're not alleging that the direct purchaser plaintiffs
3 would be entitled to argue for an overcharge theory. We're
4 not alleging that. We're alleging that we do need
5 information in our opposition, class certification to make
6 sure that the putative class is free from intraclass
7 conflicts.

8 THE COURT: And I'm trying to press you on that.
9 You say there is an intraclass conflict. I'm trying to find
10 out what is the nature of the conflict, what is the legal
11 conflict that would exist even if you got everything you
12 wanted and you got the "aha" documents and were able to say,
13 look, they did this on a cost plus basis. Point me to the
14 legal conflict that would then exist between the Big Three
15 and the rest of the direct purchasers so that I understand
16 how that would constitute a basis for denying class
17 certification. That is what I need you to do for me.

18 MR. PETERMAN: The legal conflict is some
19 members of the class would have obtained a net benefit
20 from the alleged anticompetitive activities by Abbott and
21 Fournier.

22 With the absence of generic products on the
23 market, you know, it is possible that the Big Three and
24 other wholesalers that operate on a specific type of cost
25 plus basis, you know, are better served without generic

1 products on the market.

2 Now, what we're asking for is discovery so we
3 can look into and see if in fact these types of intraclass
4 conflicts exist. The Becton case which was cited in the
5 plaintiffs' letter for the proposition that downstream
6 discovery was not proper, in that case there was actually --
7 prior to that decision, the magistrate judge in that case
8 ordered the production of the customer contracts that the
9 direct purchaser plaintiffs had with their customers. So I
10 think at a minimum, we would be entitled to that in order
11 to ascertain whether there is the potential of conflict.

12 We would also request a 30(b)(6) deposition that
13 we can take on direct purchaser plaintiffs to understand
14 the basis for their setting their prices and we do intend
15 to seek third-party discovery on the Big Three and other
16 wholesalers.

17 THE COURT: And the relevance of the discovery
18 would be to this same point that you got a net benefit and
19 your theory is, because you had a net benefit, you have a
20 different interest than the people who didn't get a net
21 benefit. Have I got you right?

22 MR. PETERMAN: Yes, that is our theory. Of
23 course, with discovery, we might be able to uncover
24 other possible intraclass conflicts between the regional
25 wholesalers and the national wholesalers.

1 THE COURT: Okay. Talk to me for a minute
2 about the assertions that are in that letter that you just
3 referred to again. That's the March 2nd letter that came
4 to me over Ms. Zeldin's signature and it cites a series of
5 cases, In Re: Vitamins, which they quote as saying no
6 courts ever allowed production of individualized downstream
7 data; the In Re: Carbon Dioxide case, that it's not
8 relevant to class certification; the two District of New
9 Jersey cases; the Becton case you noted, In Re: K-Dur;
10 these cases where they say, hey, courts are rejecting this
11 theory. What is your response to that?

12 MR. PETERMAN: A number of the cases that
13 plaintiffs have cited are not in the pharmaceutical context.
14 The Becton case as just discussed did include some discovery
15 on the downstream sales based on the customer contracts.

16 THE COURT: Well, back up just a minute. Why
17 would it make any difference whether this was in the
18 pharmaceutical or the fast food or the high school vending
19 machine? I don't know what you would -- name an industry.
20 Why does the character of the industry make a difference on
21 the legal point of whether downstream sales information
22 should be relevant to class certification?

23 MR. PETERMAN: Well, in the pharmaceutical
24 industry, you do have three national wholesalers who control
25 the bulk of the distribution of drugs. We believe that they

1 operate on a different basis in terms of setting their
2 prices than the regional wholesalers do. So I would submit
3 the pharmaceutical industry is different from these other
4 types of industries where there are not, you know, three or
5 just a small group, small group of companies that control
6 the majority of the distribution channels there.

7 THE COURT: And is the question whether a
8 class should be certified at all or whether a class could
9 be certified that included these Big Three?

10 MR. PETERMAN: I think the question is both, you
11 know, whether it's proper to certify a class, including the
12 Big Three, or whether there is any subset of classes of
13 direct purchaser plaintiffs that can be certified.

14 THE COURT: Well, help me out with the issue
15 of whether you get discovery or not as related to this
16 question. Assume, Mr. Peterman, that there was the problem
17 you have identified and that it was, as a legal matter, a
18 conflict. Would that mean that there couldn't be a direct
19 purchaser class if these three weren't in it? I'm just
20 trying to --

21 MR. CAVANAUGH: Your Honor, this is
22 Mr. Cavanaugh. If you took out the Big Three, you are
23 probably taking out in excess of 90 percent of the market,
24 if not higher; 95 percent of the market. We have to see
25 what was left of the directs to see if they had enough to

1 have a class. And it would certainly, that would have a
2 profound impact on the size of the class.

3 THE COURT: All right. Now, Mr. Peterman, let
4 me ask you a question, another question with regard to the
5 burden or the associated cost of the discovery you are
6 seeking. The assertion is that you're looking to impose an
7 enormous burden on these folks, the Big Three as well as I
8 guess the others that you say you are just the 10 percent of
9 the market, and the purpose for which you are seeking it is
10 sufficiently tenuous that even if it were somehow relevant,
11 is just not worth the candle. It's so expensive, it doesn't
12 make sense. What is your response to that specific
13 argument?

14 MR. PETERMAN: Our response is that the
15 mechanism for Rule 23 requires this detailed analysis on
16 whether a class is properly certified. The plaintiffs are
17 the ones that have the burden to prove that the class is
18 proper and in our work to oppose the class, we are entitled
19 to serve them discovery with respect to the conflicts.

20 THE COURT: And you are not really answering my
21 direct question, which is, is cost a factor that the Court
22 ought to have in mind? Unless the position you are taking;
23 and it's fine if you are, I just need you to take it; that
24 I shouldn't be worried about what the cost is, when I'm
25 looking at the requested discovery, I don't need to weigh

1 the potential relevance against the potential cost?

2 MR. PETERMAN: No, Your Honor, I'm not arguing
3 that the cost of the discovery is relevant. And it's
4 possible we can craft a certain subset of documents that
5 would be sufficient to obtain the basis upon which the
6 regional wholesalers set their places and the basis upon
7 the unnamed plaintiffs, including the Big Three, set their
8 prices.

9 THE COURT: And what is your basis for believing
10 it's cost plus markup? What do you have for asserting that,
11 that is, your good faith basis for believing this is
12 something that requires further inquiry?

13 MR. PETERMAN: Your Honor, it's our general
14 knowledge of the industry and also the fact that's none of
15 the plaintiffs or the letters from the Big Three, that
16 basis.

17 THE COURT: It's a "they didn't say no"
18 argument; right?

19 MR. CAVANAUGH: Your Honor, I think it's a
20 little more.

21 THE COURT: Well that's what I'm looking for. I
22 need something specific. What have you got?

23 MR. CAVANAUGH: Your Honor, our client tells us
24 that that is how the Big Three function, that they function
25 on a cost plus basis. And that is our understanding. And I

1 believe in the Eleventh Circuit decision, in Hytrin, it was
2 pointed out that the Big Three functioned on a cost plus
3 basis. I'm not certain of that, Your Honor, but I believe
4 that is true.

5 THE COURT: All right. Okay. Who is speaking
6 to this from the plaintiff's side?

7 MR. CRAMER: Your Honor, this is Eric Cramer
8 from Berger & Montague. I'll be speaking for the
9 plaintiffs.

10 THE COURT: All right.

11 MR. CRAMER: Let me point out upfront a point
12 that was just made in the question Your Honor made, and I
13 think that is an issue with defendants entire motion here.
14 They have no evidence of anything. All we have are
15 assertions. That to the extent they come from anywhere,
16 they come from the Eleventh Circuit decision in Valley Drug,
17 which itself said that all of these things might be true but
18 since there was no record before them about these issues in
19 Valley Drug, they don't know if it's true. So right up
20 front, we have defendants making a motion that has no
21 backup, no support.

22 Second, let me hit a discussion that was had a
23 moment ago about whether it is appropriate or proper to
24 certify a class in this context in the delayed generic entry
25 drug cases direct purchaser class, including the Big Three.

1 That question has been answered and answered repeatedly in
2 the affirmative. We have cited to Your Honor in footnote
3 two and throughout this brief, and we'll cite to Your Honor
4 in the class motion, the class decisions in In Re: Relafen,
5 in the District of Massachusetts; In Re: Buspirone in the
6 Southern District of New York; In Re: Cardizem in the
7 Southern District of Michigan; the JBDL case and various
8 others, including Valley Drug itself which was ultimately
9 certified in light of settlement in which classes were
10 certified nearly identical to the class plaintiffs seek to
11 have certified here, including the Big Three, and
12 specifically addressing the issue that Your Honor was
13 probing the defendants about as to the difference between
14 the legal injury and legal claim and the net benefit/net
15 cost analysis the defendants want to do.

16 The Court in the JBDL case which we cited to
17 Your Honor in our footnote two at 225 FRD 216 says as
18 follows: "Wyeth next argues there is a conflict between the
19 class representatives and some class members because some
20 class members purchased large quantities of premarin and
21 were able to resell it at a greater profit after price
22 increases. This argument is also without merit. Antitrust
23 injury is considered complete when the direct purchaser pays
24 an illegal overcharge and whether he was able to pass
25 through the overcharge to indirect purchaser is irrelevant

1 to the inquiry", citing Hanover Shoe, Illinois Brick and
2 other cases.

3 It goes on to state, "thus, as long as the price
4 paid by the class members for premarin was higher than it
5 would have been absent the alleged anticompetitive conduct.
6 There is no conflict created if indeed some of the direct
7 purchasers were able to recoup the overcharge through price
8 increases passed on to other purchasers."

9 In other words, the key question here is whether
10 or not there is legal injury. And as Your Honor correctly
11 probed, the legal injury is complete at the moment the
12 direct purchaser pays the overcharge. And defendants here
13 are not challenging whether plaintiffs have the right to
14 recover overcharges and don't claim that any of this
15 discovery is relevant at all to the question of legal
16 injury.

17 And the reasoning behind that comes from the
18 Supreme Court in Hanover Shoe which said that this
19 downstream information and the net benefits/net costs
20 analysis that defendants are seeking to do here is not only
21 irrelevant but it is harmful to deterrence and to the
22 enforcement of the antitrust laws because of the highly
23 burdensome nature and the endlessly complicated nature of
24 the endeavor and that is endlessly complicated, are the
25 words from the Third Circuit decision in Bogosian which

1 certified a class dismissing a lot of the arguments that
2 defendants are making here.

3 Second, and this, that is the reason, that is
4 the reason why you have a near universal bar and ban on
5 downstream discovery, from Vitamins to the Schering case to
6 the Becton case and on and on. Those cases say that the
7 end runaround Hanover Shoe that the defendants seek to
8 have, seek to employ here is improper and would harm the
9 enforcement of the antitrust laws and has no bearing on
10 class certification or the adequacy issues.

11 We agree with the defendants. And this is a
12 key point. In their letter, citing Labelstock at page
13 two, note six, they say the question here is whether the
14 defendants have made an initial showing of conditions
15 making it probable that some large subset of the class had
16 interests antagonistic to other class members. That's the
17 defendants' statement of their burden here.

18 The issue here is then would plaintiffs pursuit
19 of overcharges in this case be contrary to the interest of
20 significant subset of class? Plaintiffs have made a
21 definitive showing with definitive evidence that there is
22 no likelihood or possibility of any conflict. The national
23 wholesalers have each written to this court and said there
24 is no conflict, their interests are aligned. And as Tom
25 Long, counsel for Cardinal Health, wrote to this court and

1 Your Honor, he said, on page two of his letter which is
2 attached as Exhibit A to our papers: "First, if the point
3 of the discovery request is for defendants to determine
4 indirectly whether it is in Cardinal Health's best interest
5 to become an absent member of any certified class in this
6 case, it is not for defendants to make any such decision.
7 Defendant does not operate Cardinal Health."

8 THE COURT: Okay. Mr. Cramer, I read the letter
9 so I got that firmly in mind.

10 MR. CRAMER: Okay. And it's not only these
11 letters, it's also the fact that these national wholesalers,
12 the three of them plus every other direct purchaser has
13 participated in, by not opting out and not objecting to at
14 least six and actually several other settlements of directly
15 analogous cases in which these direct purchasers, including
16 the national wholesalers, have recovered over \$700 million
17 in overcharges.

18 Now, what could the downstream discovery and the
19 net effects analysis the defendants seek to do here possibly
20 tell us about whether it is in the national wholesalers
21 interest to be in this suit? Are defendants saying that
22 if they do some kind of mathematical computation that
23 ultimately determines that there is some benefit to the
24 defendants from delaying generic entry, are they saying
25 that that is going to trump the national wholesalers own

1 opinion as to what is in their own best interest?

2 THE COURT: Okay. Well, we'll go ahead and ask
3 them.

4 Mr. Peterman, I believe I have the plaintiffs'
5 position here. It's your motion so I'm giving you the last
6 word. What is your take on that last question and anything
7 else you want to respond to in Mr. Cramer's remarks?

8 MR. PETERMAN: Thank you, Your Honor. Our
9 basic position is this. Rule 23 requires a mechanism for
10 determining whether class certification is proper. It not
11 only protects the interest of the putative class, it
12 protects the interest of the defendants.

13 Plaintiffs are in possession of information
14 whether or not intraclass conflicts exist. We have made an
15 assertion, based on our understanding of the pharmaceutical
16 industry, of a possible conflict. And they have refused to
17 give us any discovery whatsoever where we can make a more
18 informed decision on whether there is a possible conflict
19 and bring it to the Court's attention in opposition to their
20 class certification motion.

21 MR. CRAMER: Your Honor, could I just answer
22 that last point for two seconds?

23 THE COURT: No. I think I've got everybody's
24 positions very clearly in mind. All right. And besides,
25 Mr. Cramer, you're about to win so you can relax.

1 MR. CRAMER: Thank you.

2 THE COURT: I'm not giving this discovery. I
3 appreciate the argument that has been made. I think I
4 understand the arguments that have been made by the
5 defendants here but I don't think Rule 23 requires or
6 encourages in any fashion that I permit discovery that I
7 can't figure out legal relevance for. And I don't see it.
8 If you overcharge these -- I guess the bottom line is I'm
9 accepting the primary argument the plaintiffs are making
10 here, and that is the antitrust injury occurs when you
11 overcharge, if you did. And it doesn't make a whit of
12 difference what they do with that product they get from
13 you afterwards.

14 If they can find people that they can sell it to
15 for 10 times the amount that folks ought to pay, well, then
16 maybe there is some cause of action against them by some
17 other people, but that doesn't excuse the antitrust injury
18 that is being alleged here. So the legal relevance is
19 beyond me, even as to class certification. I don't see how
20 that creates a conflict. And so I'm not going to kick the
21 door open to this kind of discovery, particularly when all
22 three of the folks who would be subject to a good deal of
23 this, and I'm talking about Big Three although I know you
24 were seeking this from all the direct purchaser plaintiffs,
25 have indicated in a way that I think is persuasive that this

1 is a fishing expedition that would be enormously expensive
2 and I believe the federal rules do require me to look at
3 what the cost of a demand is associated with its potential
4 relevance.

5 I see no relevance. If I was able to discern
6 some, I'd have to say it would be pretty small and certainly
7 not worth the candle that is being presented to me here. So
8 I'm denying the effort to get at this downstream data
9 discovery. It's not happening.

10 All right. That handles the issues that we had
11 on the table today. And I'm reluctant to do it since we
12 got so many people on the call but before I let you off,
13 traditionally, as long as we spent the money and time and
14 effort to get here, is there anything else that ought to be
15 addressed while we are all on the phone together? Is there
16 anything from the direct purchasers?

17 MR. TAUS: Your Honor, this is Barry Taus for
18 the direct purchaser class plaintiffs. We just wondering
19 with the upcoming motion to dismiss argument coming up on
20 March 15th, we were wondering whether the Court wanted to
21 direct us to any particular issues that the Court may have
22 in mind that you want us to focus on or if there is any
23 particular agenda the Court has in mind for that particular
24 argument.

25 THE COURT: No, I'll just see you in court on

1 that day.

2 MR. CRAMER: Okay. Thank you.

3 THE COURT: All right. Is there anything from
4 your clients, Ms. McGeever? Or co-counsel?

5 MR. CRAMER: No, Your Honor. Thank you.

6 THE COURT: All right. For Teva?

7 MR. GAGALA: No, Your Honor.

8 THE COURT: Impax?

9 (MS. BLIZZARD: No, Your Honor.

10 THE COURT: All right. How about from Abbott or
11 Fournier?

12 MR. CAVANAUGH: No, judge.

13 THE COURT: Okay. I think I had Pacificare on
14 here as well. Is there anything from you folks?

15 MR. TURNER: Nothing from us, Your Honor.

16 THE COURT: I probably left somebody off. If I
17 have, I'm sorry.

18 MR. NALVEN: Your Honor, David Nalven for the
19 indirect class. We also have nothing at this time.

20 THE COURT: All right. Well, thanks for your
21 time today. I'll get a short order out that just references
22 this call as the basis for my rulings, and you folks go
23 ahead and move forward, if you would, on the guidance given
24 here. We'll talk to you all later. Good-bye.

25 (Telephone conference ends at 12:20 p.m.)